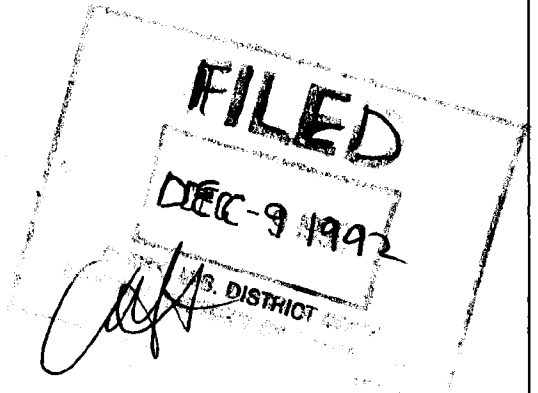


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9 UNITED STATES DISTRICT COURT

10 FOR THE CENTRAL DISTRICT OF CALIFORNIA

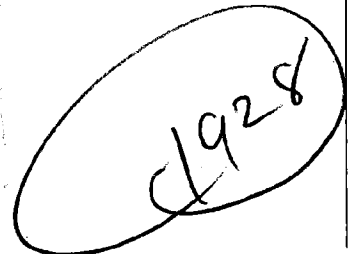
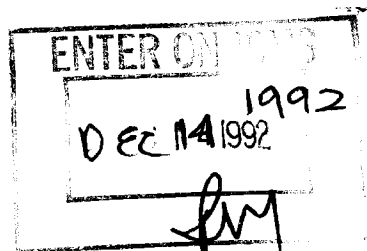
11 UNITED STATES OF AMERICA,)	No. CR 87-422(G)-ER
)	
12 Plaintiff,)	<u>GOVERNMENT'S PROFFER RE:</u>
)	<u>WITNESS GUILLERMO FLORES;</u>
13 v.)	<u>MEMORANDUM OF POINTS AND</u>
)	<u>AUTHORITIES</u>
14 RAFAEL CARO-QUINTERO, et al.))	
)	
15 Defendants.)	
)	

16
17 Plaintiff, United States of America, through its counsel of
18 record, hereby files, as requested by the court, a proffer
19 regarding the anticipated testimony of witness Guillermo Flores.
20 This proffer is based upon the attached Memorandum Of Points and
21 Authorities, the files and records in this case, and such other

22 //

23 //

24 //



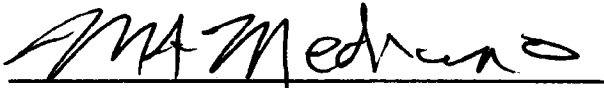
1 matter as may properly be considered by the court at the time of
2 the hearing on this motion.


3 DATED: December 9, 1992.

4 Respectfully submitted,

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I

3 PRELIMINARY STATEMENT

4 On December 3, 1992, the court ordered the government to
5 submit a written proffer of the anticipated testimony of witness
6 Guillermo Flores. Described below is a summary of the witness'
7 anticipated testimony, as well as the government's theories of
8 admissibility for any statements that the defense may endeavor
9 to characterize as hearsay.

10 II

11 SUMMARY OF WITNESS GUILLERMO FLORES

12 Guillermo Flores is 29 years old and a Mexican national. He
13 was member of the Mexican army from 1980 until early 1992.

14 Flores will testify that in approximately October, 1984, he
15 and other soldiers traveled to the state of Jalisco to
16 participate in one week of military olympics. Approximately
17 fourteen squads from all over Mexico participated in the
18 olympics. At the end of the olympics, Flores and other soldiers
19 received orders directing all squads to participate in a
20 marijuana eradication program called "Operation Jaguar." Flores
21 was one of two lieutenants in charge of a squad; he and a second
22 lieutenant reported to Captain Francisco Rodrigo Rodriguez-
23 Galindo. Flores' squad was assigned to eradicate marijuana in
24 the region of Mascota.

25 Flores' squad arrived in Mascota in early November, 1984.
26 Flores' orders were to find and eradicate marijuana fields,
27 arrest and question those involved, and attempt to ascertain the
28

1 ownership of the marijuana fields. Upon arrival in Mascota,
2 Flores and his squad immediately discovered large fields of
3 marijuana. The squad arrested workers in the fields and
4 questioned them regarding ownership of the marijuana fields.
5 The workers stated that the fields belonged to Ruben Zuno-Arce
6 ("Zuno"). One of the individuals arrested and questioned was a
7 local village mayor, who also stated that the land and marijuana
8 fields belonged to Zuno.

9 Thereafter, Captain Rodriguez, Flores and several soldiers
10 went to Zuno's ranch in Mascota to talk to Zuno. Flores advised
11 Captain Rodriguez that Zuno was the brother-in-law of ex-
12 president Luis Echeverria, and that the matter should be handled
13 delicately. Zuno was not present when Flores and Rodriguez
14 arrived, and Rodriguez ordered Flores to continue eradicating
15 marijuana fields.

16 Flores took some soldiers and returned to the area around
17 Mascota, and continued searching for and eradicating marijuana
18 fields. The soldiers and Flores also continued arresting and
19 questioning field workers, who uniformly continued to state that
20 the fields belonged to Zuno. Approximately two days later,
21 Flores returned to the town of Mascota and saw Captain Rodriguez
22 speaking to Zuno. Zuno appeared tense. Afterwards Flores asked
23 Captain Rodriguez why he had not yet arrested Zuno. Rodriguez
24 said that he was awaiting orders, and was continuing to
25 investigate the matter. The next day Flores observed the local
26 village mayor, whom he had previously arrested, walking in
27 Mascota. Flores again asked Captain Rodriguez why he had not

1 arrested Zuno. Rodriguez angrily responded that he had been
2 ordered from higher up that there were to be no problems with
3 Zuno. Rodriguez admonished Flores to just go about his business
4 and he [Flores] also would receive a little gift. Rodriguez
5 then showed Flores an unknown quantity of bills.

6 Later that same day, Flores saw Zuno with Captain Rodriguez
7 at an airplane hangar. Zuno offered to Captain Rodriguez the
8 use of Zuno's plane to see if there were anymore marijuana
9 fields around Mascota. Rodriguez accepted Zuno's offer. This
10 seemed odd to Flores because army personnel generally were only
11 allowed to fly when authorized by Mexico City, and even then
12 only in Mexican military planes. Thereafter, Rodriguez ordered
13 Flores to take some men and continue to look for more marijuana
14 fields.

15 While out eradicating more marijuana fields, the previously
16 arrested field workers told Flores that the military in Mascota
17 was on the traffickers' payroll. While eradicating a large
18 marijuana field, Flores received radio orders from Captain
19 Rodriguez to return immediately to Mascota because everyone was
20 to return to Guadalajara. Flores complained to Rodriguez that
21 he was not yet finished destroying a giant marijuana field, and
22 that if he returned he would not be able to complete his
23 mission. Captain Rodriguez angrily replied that that did not
24 matter and that Flores was to return immediately. Flores left
25 the area with his men and left numerous fields of marijuana
26 behind.

1 Upon Flores' arrival in the town of Mascota, he saw Zuno
2 talking and joking with Captain Rodriguez near a hangar. Zuno
3 now looked relaxed. Thereafter, Flores and his entire squad
4 were ordered to return to Guadalajara.

5 III

6 THE PROFFERED TESTIMONY IS RELEVANT AND CANNOT
7 BE EXCLUDED ON HEARSAY GROUNDS

8
9 A. The Testimony Is Relevant

10 The indictment alleges that defendant Zuno was a member
11 of the Guadalajara Narcotics Cartel. The Flores testimony helps
12 to establish the nature of his membership. At the last trial,
13 defendant Zuno argued that there was no substantial evidence
14 that he was a trafficker, and therefore no reason to believe
15 that he would have been involved with the cartel. Flores'
16 testimony rebuts such an argument. A jury may infer from such
17 testimony that defendant Zuno was a trafficker involved in the
18 sale and distribution of vast amounts of marijuana. In
19 conjunction with other evidence to be presented that defendant
20 Zuno socialized with cartel leaders and directly participated in
21 the conspiracy to kidnap Agent Camarena, the Flores testimony
22 clarifies the nature of defendant Zuno's relationship to the
23 cartel: he was a co-trafficker. To the extent that defendant
24 Zuno can be seen as a cartel member, the Flores testimony serves
25 to define the cartel's operations. Thus, such testimony is
26 relevant.

27 B. The Testimony Cannot Be Excluded On Hearsay Grounds
28

1 1. The Workers Statements Are Admissions

2 The statements of the workers in the marijuana fields to
3 Flores are non-hearsay in that they are admissions of a party-
4 opponent. Fed. R. Evid. 801(d)(2)(D) provides in relevant part:
5 "A statement is not hearsay if -- * * * (2) The statement is
6 offered against a party and is * * * (D) a statement by the
7 party's agent or servant concerning a matter within the scope of
8 the agency or employment, made during the existence of the
9 relationship"

10 Here, Flores' orders were to find and eradicate marijuana
11 fields, arrest and question those involved, and attempt to
12 ascertain the ownership of the marijuana fields. Flores
13 questioned workers in the fields as part of his official duties.
14 In response to Flores' questions about who owned the marijuana
15 fields, worker after worker responded "Zuno." The workers'
16 statements were corroborated by the village mayor who also
17 stated that Zuno owned the fields.

18 The workers' statements were made during the course of their
19 employment. They were tending to the marijuana fields when
20 Flores arrived; Flores arrested and questioned them there. The
21 workers statements concern a matter within the scope of their
22 employment, i.e., the identity of their employer.

23 "The fact of agency may not be proved by the alleged agent's
24 extrajudicial statements." United States v. Jones 766 F.2d 412,
25 415 (9th Cir. 1985). Here, the agency is established by
26 independent non-hearsay: Flores observed the workers tending to
27 the marijuana fields, cultivating the soil and caring for the

1 plants. The worker's statements implicating defendant Zuno
2 aside, there is no question that the workers were at the fields
3 performing work.

4 Flores' observations and the workers' statements other than
5 those identifying their employer, suffice to establish agency.

6 In United States v. Jones, a victim making a ransom drop in
7 response to defendant's extortion threats was allowed to testify
8 about the statements made by two strangers who approached her
9 and demanded the money. United States v. Jones, *supra*, 766 F.2d
10 at 415 (9th Cir. 1985). The court found that "[t]his
11 independent non-hearsay evidence strongly suggests that [the two
12 strangers] had been in contact with the extortionist and were
13 performing functions on his behalf, namely, the pick-up of the
14 ransom money." *Ibid.* The court concluded that this constituted
15 "'substantial' evidence indicating that [the two strangers] were
16 agents of [defendant] and that their statements were made during
17 the existence of their agencies concerning matters within the
18 scope of their agencies." *Ibid.* The agents' statements were
19 therefore properly admitted as admissions of a party-opponent,
20 notwithstanding that the two strangers could not be located at
21 the time of trial. *Ibid.*

22 Flores' testimony is no different than that admitted into
23 evidence in Jones. The agency is established by Flores'
24 observations of who was at the marijuana fields, and what he saw
25 them doing. The worker's statements are therefore admissible as
26 admissions of a party-opponent.

1 Indeed, even if the field workers' statements were made
2 without personal knowledge of their accuracy, they are
3 admissible. FDIC v. First Interstate Bank of Des Moines, 885
4 F.2d 423, 435 (8th Cir. 1989) (Employee's statement that another
5 employee was stealing bonds admissible against employer sued for
6 loss regardless of declarant's personal knowledge of accuracy of
7 statement.) "As a general matter, employee statements made
8 against the interest of an employer are representative
9 admissions and are admissible [under] Fed. R. Evid.
10 801(d)(2)(D)." Id.

11 Thus, the workers' statements to Flores are admissible under
12 the general proposition that: "Evidence of statements by an
13 agent introduced in order to show the purpose for which he did
14 an act or to show his knowledge or state of mind is admissible
15 in favor of and against the principal under the rules relating
16 to the introduction of evidence for this purpose. Statements by
17 an agent are not excluded because made by an agent. If his
18 knowledge or condition of mind or purpose is relevant to the
19 cause of action which is being brought, either party may
20 introduce evidence relevant to show this." Garford Trucking
21 Corp v. Mann 163 F.2d 71, 71 (1st Cir. 1947), cert. denied, 68
22 S.Ct 112, 332 U.S. 810 (1947), citing Restatement of Agency
23 §289, comment c.

24 Here, the workers' knowledge, condition of mind and purpose
25 in tending to the marijuana fields are relevant in that they
26 evidence defendant Zuno's involvement in the drug cartel. The
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1 workers' statements reinforce other evidence that defendant Zuno
2 was a member of the cartel.

3 2. The Workers' and Village Mayor's Statements Were
4 Made Against Their Penal Interest And Are
5 Therefore Admissible

6 The marijuana field workers' and village mayor's statements
7 to Flores were made at the time of their respective arrests.
8 The statements were against penal interests in that they showed
9 knowledge of involvement in illegal activities. The statements
10 are therefore admissible under Fed. R. Evid. 804(b), which
11 provides in relevant part: "The following are not excluded by
12 the hearsay rule if the declarant is unavailable as a witness:
13 * * * (3) **Statement against interest.** A statement which was at
14 the time of its making so far contrary to the declarant's
15 pecuniary or proprietary interest, or so far tended to subject
16 the declarant to civil or criminal liability . . . that a
17 reasonable person in the declarant's position would not have
18 made the statement unless believing it to be true."

19 The workers and village mayor are unavailable as required by
20 Fed. R. Evid 804(a)(5). They are absent from the trial, and the
21 government has been unable to procure their attendance or
22 testimony by process or other reasonable means. In United
23 States v. Winn, 767 F.2d 527 (9th Cir. 1985), the court held
24 that the government established unavailability of two Mexican
25 foreign nationals who were released after interrogation, because
26 the government had no reasonable means of locating the foreign
27 nationals who had been returned to Mexico by the INS. Id. at

1 530. Indeed, the court held that because "the government had no
2 addresses or any other information that would help locate [the
3 witnesses] . . . it was reasonable for the government to make no
4 effort to find the two aliens." Ibid, (emphasis added).

5 The Winn court held that the foreign nationals' statements
6 were admissible, and did not violate the confrontation clause
7 because the individuals were unavailable, and because the
8 statements were not unreliable. Ibid. The court considered
9 four factors to determine whether a statement is unreliable: "1)
10 the statement contains an assertion of past fact; 2) the
11 declarant did not have personal knowledge of the facts asserted;
12 3) there is a possibility of faulty recollection, and 4) the
13 circumstances suggest that the declarant misrepresented
14 defendant's role." Ibid, citing Dutton v. Evans, 400 U.S. 74,
15 88-89; 91 S.Ct. 210, 219-220 (1970).

16 Here, the government has no way to identify the marijuana
17 field workers or the village mayor. They are therefore
18 unavailable. Neither are their statements unreliable when
19 judged by the above four-part test. None of the witnesses made
20 statements about past facts. The workers who tended to the
21 marijuana fields certainly knew for whom they were working, and
22 it is unlikely that the small village mayor would not also know
23 this information. Finally, there are no circumstances
24 suggesting that worker after worker misrepresented defendant's
25 role. They had no motive to do so, neither did the village
26 mayor.

1 The declarant' statements to Flores were thus made under
2 circumstances that guarantee their trustworthiness. The
3 individuals were facing arrest by Mexican military personnel;
4 they were interrogated as to their knowledge about the marijuana
5 fields, and the extent of their own involvement in the fields.
6 The workers knew who owned fields. Over and over the workers
7 gave the same name to Flores: defendant Zuno. The village
8 mayor also pointed to defendant Zuno as the owner of the
9 marijuana fields. It stretches credibility to believe that
10 everyone could have been wrong, and yet everyone pointed to the
11 same person: defendant Zuno. These circumstances guarantee the
12 trustworthiness of the statements. Flores should therefore be
13 allowed to testify about what the workers told him at the time
14 of their interrogation and arrest.

15 3. The Statements Are Not Offered For The Truth Of
16 The Matter Asserted

17 The marijuana field workers' and village mayor's statements
18 are not hearsay because they are not offered for the truth of
19 the matter asserted. Whether defendant Zuno owned these
20 particular marijuana fields is irrelevant. The fact that the
21 workers connected defendant Zuno to owning vast marijuana fields
22 is the important point.

23 The workers' and village mayor's statements have independent
24 probative value to prove defendant Zuno's involvement in drug
25 trafficking, regardless of whether defendant Zuno in fact owned
26 these particular marijuana fields. That individuals repeatedly
27 implicated defendant Zuno in the context of owning marijuana

1 fields has independent relevance, making the statements
2 admissible. United States v. Candoli, 496 F.2d 496, 508
3 ("Because [unavailable witness'] statement was not admitted for
4 the truth of the matter asserted, it was not hearsay. It was
5 properly admitted by the district court if it was relevant.")
6 These statements reinforce other evidence that defendant Zuno
7 was a member of the drug cartel that blamed DEA for forcing the
8 Mexican military to destroy the traffickers' marijuana fields.
9 The drug cartel retaliated against DEA by kidnapping and
10 murdering Agent Camarena. Relevance is therefore established.
11 Furthermore, because the statements are not admitted for the
12 truth of the matter asserted, there is no confrontation clause
13 problem. United States v. Kirk, 844 F.2d 660, 663 (9th Cir.
14 1988) ("Because the statements were not offered for the truth of
15 the matter asserted, no confrontation clause violation
16 occurred."); United States v. Castro, 887 F.2d 988, 1000 (9th
17 Cir. 1989) (credit reports not hearsay because not introduced
18 for truth of their contents, and there was therefore no
19 violation of confrontation rights).
20 Moreover, regardless of the truth of the field worker's and
21 village mayor's statements, the Mexican army had independent
22 information connecting defendant Zuno to the marijuana fields.
23 To stay in line with their mission, the army should have
24 arrested defendant Zuno for his involvement in the marijuana
25 fields. They did not. Instead, the army captain in charge of
26 the mission reacted angrily when Flores pursued the issue, and
27 later the captain told Flores that he, too, would be generously

1 compensated for 'going along.' Ultimately, the Mexican army
2 shirked its mission by pulling out of Mascota, rather than
3 arresting defendant Zuno and destroying the marijuana fields.

4 The deliberate inaction of the Mexican army, the reaction of
5 the army captain to Flores' insistence that they destroy all of
6 the marijuana fields, and Flores' observations of defendant Zuno
7 with the captain all show that defendant Zuno exercised powerful
8 influence to protect the marijuana fields. These facts evidence
9 that defendant Zuno was a leader in the drug cartel who
10 exercised influence at the highest levels to protect his vast
11 marijuana fields.

12 In light of this independent evidence, the workers' and
13 village mayor's statements should be admitted as non-hearsay,
14 because they are not offered for the truth of the matter
15 asserted. The statements are relevant regardless of truth, in
16 that they are part of the web of evidence tying defendant Zuno
17 to drug trafficking and the drug cartel.

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1 For the foregoing reasons, the Court should allow Flores to
2 testify as to the statements made by the marijuana field workers
3 and the village mayor.

4 DATED: December 9, 1992.

5 Respectfully submitted

6 TERREE A. BOWERS
United States Attorney

7 ROBERT L. BROSIO
8 Assistant United States Attorney
Chief, Criminal Division

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11 JOHN L. CARLTON
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CERTIFICATE OF SERVICE

I, John L. Carlton, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

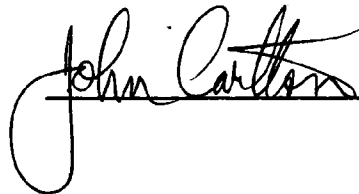
That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by hand described in this Certificate was made; that on December 9, 1992, I hand delivered, in the above-entitled action, a copy of

GOVERNMENT'S PROFFER RE: WITNESS GUILLERMO FLORES:
MEMORANDUM OF POINTS AND AUTHORITIES

addressed to SEE ATTACHED LIST

This Certificate is executed on December 9, 1992 at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.



USA-40-12-5
(Rev. 08/12/83)

SERVICE LIST
CR 87-422(G)-ER

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